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**Kenya's Constitution and Institutional Reforms
after Political Violence 1991-2010**

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Introduction

The involvement of the International Criminal Court in Kenya's political crisis, after the 2007-8 political violence, perhaps is the most discussed of the four main reform agenda undertaken to redress the immediate and remote causes of political violence that has rocked Kenya since 1991. However, the involvement of the ICC in Kenya's political affairs, arguably, is only remarkable to the extent that it has either stymied or enabled Kenya to undertake difficult constitutional and institutional reforms. Indeed, it hard to tell what type of political reforms Kenya's nationally organized groups would have achieved with or without the international pressure, including but not limited to the credible threat of ICC prosecution of Kenyan elite.

This policy brief looks at what the cyclical political violence, which characterized Kenya's transition from one-party and presidential political contests, has produced: the deaths, the patterns of violence, the beneficiaries of the violence, ways of seeing Kenyan politics, political fears, and more importantly the constitutional, institutional and policy responses to these crises.

Despite Kenya's remarkable constitutional and institutional reforms, it seems that the new political institutions and processes

seems to be hardening ethnic identity, or valorizing ethnic identification, contrary to the objectives of the Constitution of Kenya 2010 that seeks to promote social pluralism. It also seems to produce two intertwined political consciousness, at once ethnic-conscious and rights-conscious citizenry. Poignantly, ethnic-centric analysis of Kenya's social question seemed to elide equally important social cleavages of the Kenyan society: gender, age, race, class and religion.

Political Violence, Multi-Partyism and Democratization

The official reports, namely the *Parliamentary Select Committee to Investigate Ethnic Clashes in Western and other parts of Kenya* (the Kiliku Report, 1992), the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya* (the Akiwumi Report, 2002), the *Commission of Inquiry into Post Election Violence* (the Waki Report, 2008) notes that:

The first wave of violence, 1991-1998, targeted mostly those from ethnic groups perceived to supporters of opposition pressure groups and parties, particularly Forum for the Restoration of Democracy. It was widely experienced in the former white highland (settlement schemes) located along the borders of the Rift Valley Province, and at the Coast Province in 1997. Although the claim of land injustices by the Kalenjin and the Maasai was invoked as the reason for the violence, the violence was largely directed against peasants, small-holder farms in the Rift Valley.

Notably, those in the Daniel Arap Moi regime who were directing the violence did not target the large land holding by Kenyan elites and the Multi-National Companies, who sit on vast lands, whose ownership is even more contestable than a significant number of small holder farms bought off the land markets, sometimes by controversial land buying companies. Nor did they direct the violence against the controversial beach plots, owned by the Kenyan elite, along the Indian Ocean coastline in the then Kenya's Coast Province.

Neither Ethnic Violence nor Land Clashes

Thus the violence was political, to the extent that it was largely directed against the non-Kalenjin and non-Maasai ethnic groups living in the then Rift Valley province, namely, the Kikuyu, Kisii, Luo, the Luhya, the Bukusu, and the Teso, or '*wabara*' (those from hinterlands of the Kenyan Coast) at the then Coast Province. Additionally, it was land related, to the extent that it only targeted the smallholder peasants or urban dweller and peasants at the Coast, whose electoral choice was viewed as threat to the ruling party's presidential, Kenya African National Union, grip on state power in the competitive elections of 1992 and 1997.

The existent media reports and the official reports suggest that the first wave of violence was perpetrated by people whose real identity remains largely unknown, with the complicity of the Moi government. The identity of the 'Kalenjin warriors' widely reported to have committed the violence remains a mystery. However, the Moi regime in general, and the Kalenjin, especially the leaders who have built a career out of ethnic fear-mongering, and the peasants who use the lands of those displaced by violence, are the prime beneficiaries of these cycle of violence.

The numbers of those killed, raped, maimed and displaced by the first wave of violence are contestable. The most widely cited numbers on those killed is the *Africa Rights Watch* or the *Human Rights Watch* 1993 Report: *Divide and Rule*. Although the report explains how it arrived at the displaced as 300,000, the report does not explain how it arrives at the 1,500 killed. Moreover, those who cite the Human Rights Watch numbers often take no notice of the fact that the violence and the killings continued well after the date of the publication of the report. The report was mostly concern with present land claims, not the past land claims, arguably, the basis of current contentious politics.

Moreover, the Human Rights Watch Report in its tacit endorsement of sedentary agrarian preferences demonstrates a bias

against the Kalenjin in particular and the pastoralist in general. It also relies on very thin evidence from Njehu Gatabaki's *Finance*, whose anti-Kalenjin bias is well documented, to make a strong claim that Kalenjin politicians owned an army believed to have committed the violence. However, the extant media reportage during this period bears out the fact that well-organized gangs committed the violence; however, there is no sufficient evidence that categorically identifies the 'warriors' as Kalenjin. The only evidence that links the warriors to the Kalenjin is the affidavit of a Valentine Kodipo, but Kodipo, the only known self-confessed member of this 'Kalenjin warriors', makes claims are largely uncorroborated and circumstantial, certainly by the truth regime of liberal rights discourses.

The official report, namely the Akiwumi report, does not present the numbers of those killed, maimed, raped and displaced. The commission cross-examined only mid level police and government officers and the victims of violence. The report noted the acts of omission and commission of government officers, the involvement of police officers, aided the warriors who killed, maimed and burnt houses. However, its explanation of the violence as something driven by culture, tradition, cattle rustling, ethnic resentment and hatred, downplays the significance of the Moi regime's involvement as the principal financier and directors of the violence.

The recommended only the prosecution of mid to low level government officers and ministers. Although the Akiwumi Report concluded that the violence was political, it offered a cultural explanation for the violence. It only recommended a limited reform of the Provincial Administration and prosecution of those believed to have sponsored the violence or whose acts of omission or commission aided and abetted the violence. However, in 2002, the High Court of Kenya declared the report a nullity, after finding, on its own, that Report had been presented to the President after the expiry of the Commission's mandate.

The systemic attacks on the ethnic groups perceived to be supporting opposition parties and the accompanying political rhetoric of the KANU and opposition politicians raised the level of ethnic consciousness to a new high. Inter-ethnic group relations in the Rift Valley were increasingly characterized by tension, suspicion and low trust. The politics and the violence united the Kalenjin elite, who turned an emerging Kalenjin inter-class struggle over land into an intra-peasant violence along the ethnic cleavage. While the human rights groups and Church-based organizations rose to defend the victims of violence by invoking human rights, other ethnic association such as the Gikuyu Embu Meru Association (GEMA) or politicians also rose to defend their co-ethnic living in the Rift Valley. Kenya witnessed the rise of political militia groups, both in the urban and rural areas, notably: the *Bhagdad Boys*, *Mungiki*, *Jeshi la Mzee*, among others.

The Second Wave

The official report on the second wave of violence, 2007-2008, the Waki Report meticulously documented the numbers of those killed, maimed, raped and displaced by the violence occasioned by the disputed presidential elections. However, it mostly relied on official police and hospital records, and records of humanitarian non-governmental organizations. Kenyans, notably, those from the regions, which perceived the Kibaki government as hostile to their interests, did not participate in the Commission's deliberations.

The Waki Report found that the second wave of violence was spontaneous in some areas and planned in others. The Rift Valley experienced both. The planned violence, one believed to have been planned by the Kalenjin elite and the other by the Kikuyu elite, from the State House in Nairobi and a private members club in Nairobi. Both used militias to execute the violence, however, the Kikuyu elite directed militias (the *Mungiki*) were aided by a complicit police force in the crime committed against Orange Democratic Movements supporters in Nakuru and Naivasha.

The report noted that the police and the militia groups accounted for most of the killings. The police was found to have partisan and the least prepared of the forces, in the run up to the general election. Unlike the previous wave of violence committed by the so-called warriors, this wave largely set neighbor against neighbor, government installation and business enterprises. Rift Valley Province registered the highest number of those killed (744), followed by Nyanza (134), Nairobi (125), Western (98), Coast (27), and Central (5). In total 1,133 people were killed, with the Kenya Police killings accounting for 35.7 percent or 405 deaths, however, the majority of killings being citizen on citizen murders. Sexual violence such as sodomy, gang rape, forced circumcision and mutilation of the penis were also recorded, especially in the Rift Valley and slums of Nairobi.

The report noted that the second wave of violence was more widespread: it affected several provinces, rural and urban areas, especially the slum of Nairobi, Eldoret and Kisumu. The report was categorical that the violence was political. It recommended thorough reforms of the Police force, notably, placing nearly all the major armed formations under the command of the Inspector General of Police. Notably, it recommended that those believed to bear the greatest responsibility for the violence be prosecuted through a special tribunal or by the International Criminal Court.

Dual Political Consciousness

The political contestations defined by these two waves of violence have produced two types of political consciousness: rights consciousness and ethnic consciousness. Arguably, the struggle for a liberal democratic order, and sometimes social democratic order, championed the mostly by lawyers' led non-governmental, professional associations, and social movements has produced a right conscious citizenry whose rallying call in public protests often is '*haki yetu*,' (our rights). Conversely, the struggle to retain or seize state power, at any cost, has also produced politicians and a

citizenry that is conscious of their ethnic identity, whose mobilizing ideology is ethnicity, and make political claim based on real or imagined claims of indigeneity, marginalization, and historical injustice. The rallying call of this group is often '*watu wetu*' ('our people') are being or have been marginalized, or 'are being finished.' This politics is driven by the fear of losing privileged access to state resources, use of state power to keep advantages, and the fear of losing out to other elites in political competitions.

These two strands of politics run parallel to each other, albeit in a double helix like formation. There are critical nodes when ethnic interest is articulated as liberal rights and liberal rights discourse is articulated in defense of 'ethnic' rights. These debates are not only invoked in the struggle for land, but also over who has the right to occupy a public office, and whether or not a particular ethnic group has its fair share of public jobs, given the most recent census demographic figures.

What Kenyans Fear

Poignantly, during this period, the arguments for political transition and democracy, reveals that Kenyans have not redressed the founding fears of Kenya as a unitary state, a common political entity for three regions the British ruled as geographically distinct: namely, the Kenya Colony and Protectorate, the Sultanate and the North Frontier Districts. The Kenya state, arguably, was founded on the basis of three profound fears, and subjectivities wrought by settler colonialism state craft of divide and rule. These fears have not only shaped how Kenyans organize socially, but also how Kenya's constitution and institutions have been designed.

At the Lancaster House Constitutional Talks three profound fears were: fear of racial discrimination and domination, fear of ethnic discrimination and domination, and fear of centralized state power, especially its use to champion either racial or ethnic discrimination or domination. Given the fact that Lancaster House

Constitutional Talks were male dominated, one can add that fear of male domination to this list and the fear of rule by old men, gerontocracy, wrought by Mwai Kibaki's preferences for appointing 'retirees,' when youth unemployment remains high and Kenya had a youth bulge.

Epistemic Blind Spots of Ethnic Lenses

A reading of the major reports on the political violence suggests that many analysts of Kenya politics mostly look at Kenya through ethnic lenses. However, the use of ethnicity as the most salient social cleavage to evaluate presidential candidates, appointment to 'the commanding heights' of state-bureaucracy, the allocation of funds and to assess the (un) fairness of a regime often mask other salient cleavages, which also define Kenya's politics. It wrongly represents Kenya as mono-cleavage society, whose challenges to diversity and inclusion would be redressed if Kenya became an ethnically inclusive society. Using ethnic lens often elide other equally significant social cleavages: class, age, race, gender, ideological, and religious of Kenyan society.

Constitution and Policy Interventions

In 2010, Kenya enacted a constitution as a comprehensive response to the political crisis wrought by the multiparty political competition. Notably the constitution attempt to redress the excesses of majoritarianism in Kenya's politics: through devolution of state power, provision on regional equity on resource allocation and appointment to public office, and the establishment of the National Cohesion and Integration Commission to redress ethnic and racial discrimination.

Although the Constitution of Kenya 2010 created 47 Counties, the inability of Kenya political elite to agree on an alternative electoral systems and the political realignment occasioned by the emergence of Uhuru Kenyatta and William Ruto's political rapprochement led to a political compromise on the nearly colonial

district boundaries for the County government has done little to redress the problematic ethnic logic of Kenya's politics. Most of the administrative boundaries of the devolved government are based more or less on the 1962 District boundaries. In 1962, 35 out of 41 Districts had one dominant ethnic group; an absolute majority of the population, in 17 Districts over 90 percent was of the same ethnicity.

Although key locations within the Rift Valley and the Coast had experienced significant demographic shifts, ethnic dominance remains a key characteristics of most the new County governments. There is a high risks of County government will reproduce the politics of exclusion and marginalization, given ethnic dominance and majoritarian voting patterns. In Counties, such Narok, and Kajiado County, where Maasai are demographically outnumbered by other ethnic groups, risk producing a double sense of loss: loss of land and chance to lead at the national and local levels of government.

Kenya's majoritarian democracy seems to be at odds with the general constitutional quest for political inclusivity. Consequently, the current electoral system is bound to generate conflicts between groups that claim indigeneity in particular counties, and have legitimate claims of being marginalized, but have a limited chance of winning in majoritarian electoral competition, where ethnic consciousness run deep.

Constitution and Diversity

Legally, ethnicity is something that the Constitution of Kenya has not defined. The preamble of the Constitution of Kenya, 2010 states that 'ethnic, cultural and religious diversity' is something Kenyans are proud of. However, it mostly uses several proxies such as 'regional balance,' diversity of language, culture, and communities to refer to ethnicity. The National Cohesion and Integration Commission is the Constitution of Kenya 2010's answers to the ethnic, gender, age, religious and race questions in Kenya.

Despite having the official mandate to do all that appertains to ethnic and racial discrimination, the National Cohesion and Integration Commission has a nebulous definition of ethnicity. The Act does not even attempt to define race or racial relations. The Act of Parliament that establishes this Commission defines ethnic group as *'a group of person defined by reference to color, race, religion, or ethnic or national origins,'* and that *'reference to a person's ethnic group refers to any ethnic group to which a person belongs,'* on the one hand. On other hand, *'ethnic relations' include 'racial, religious, tribal and cultural interactions between various communities, and the word ethnic and ethnicity shall be construed accordingly.'*¹ Its powers include the power to recommendation prosecution of those accused of ethnic discrimination in employment or allocation of national resource, and hate speech. Its duties, includes, conciliating warring groups, *'name those whose words or conduct undermine good ethnic relations'* and educate Kenyans peaceful co-existence in diversity.

However, the Commission's critique point out that prosecution of individuals who air views considered ethnic hate speech is counterproductive and a waste of public resources. They argue that what is at stake here is the issue of rights and the place of free speech in Kenyan society. Therefore, imposing stiff penal sanctions cannot work in situation where ethnic prejudice is so perverse and offender too many. Instead, the Commission should expose those who trade in ethnic slur and prejudice as wrong and simple minded. Moreover, the Commission and the media should educate Kenyans about the ethnic prejudices Kenyan comedians and politician purvey; this would yield better outcome, argues the critics of the Commission. However, would naming and shaming those who hold prejudice against others really brings social pressure to bear on the accused?

1 Republic of Kenya, *National Cohesion and Integration Act no.12 of 2008* (Revised in 2012). Nairobi: Government Printer.

NCIC Ethnic Representation in Public Sector Reports

The law mandates NCIC to ensure that: 'All public establishments shall seek to represent the diversity of the people of Kenya in the employment of staff' and that 'No public establishment shall have more than one third of its staff from the same ethnic community.' However, the commission's legal mandate is mostly or only concern with ethnic diversity in public service, Kenya's private sector is perceived to be no different.

Moreover, the private sector and the public sector are independent, and arguably, ought to be judged by one set of morality, especially where government is the biggest consumer of whatever the private sector consumes. Arguably, acts of ethnic discrimination within the private sector are just as consequential as the acts of discrimination within public service. What aspects of ethnic relations can public policy regulate or ought to regulate? When and why was the practice of listing and prominently displaying the names of all key government officials outside the main offices discontinued?

Whereas the Commission's periodic reports on the ethnic composition of Kenya's public reports the percentage of ethnic groups in public employment vis-à-vis the most recent census demographic findings (2009) it is not clear how the Commission operationalizes the concept of ethnicity and translates it into statistics, given the nebulous legal definition referred to earlier. The census process allows for self-identification as a member of an ethnic group, however, how does the Commission determine one's ethnicity in its reports? How would one tell someone's ethnicity? Can it be done from one's '*race, color, religion ethnic or national origin*'? Does the commission do a head count and a self-identification exercise to determine who belong to which ethnic group? Or does the Commission infer these identities from the middle, surname or both of civil servants from a master-pay roll of all government employees? If so, how significant is the likely error of omission and inclusion of people with frequently occurring cross-ethnic names, women who take up their husbands names, Muslim names, and the

‘ghost workers created by top-bureaucrats? How do these errors of omission and commission impact on the overall figures said to represent ethnic domination in government?

Individual Merit or Historical Injustices

The proponents of the Constitution of Kenya 2010 argue that Article 10 and 232 of the constitution has fundamentally altered the matrix of factors to be considered when making public appointment or allocation public resources. They argue that ethnicity, disability, gender and age should be taken into account, besides merits. However, critics of those demanding ethnic diversity within the public service are ‘regional balancing of employment opportunity,’ works against individual merit. It also contravenes the Constitution’s Bill of right, which categorically states that no one should be discriminated against, on the account of ethnicity, among other grounds. What is just in this context? How fair is the use of imputed ethnic identities in making public appointments? Should advertisement for public jobs individualize the responsibility of ensuring ethnic diversity, by stating expressly those who need not apply for the job? Or state expressly only those who should apply for the job? What is the purpose of civil service in Kenya today?

The critics of the Constitution argue for an ethnic-blind (merit only) allocation of public employment opportunities, but the proponent of the Constitution argue for an ethnic-sighted appointment to public office (sensitivity to past historical disadvantages). The proponents of the diversity articles of the constitution cite a history of exclusion and marginalization based on ethnicity, as something that must be taken into account, and that the new Kenya polity aims at diversity and unity as the ultimate goals to be maximized by in allocating public offices and state resources. What is fairness according to the Constitution of Kenya 2010?

Lastly, whereas the Commission is said to be independent, it is independent only to the extent that it determines its activities once parliament has allocated it funds. The Commission depends on

the good will of the parliament, by extension the government, who decides how much resources it is allocated to perform its duties. Yet parliamentarians and the incumbent government always top its list of offenders, at any given moment. How effectively can the Commission fulfill its mission under such conditions?

Media Reportage

The audit reports of Kenya's Civil Service such as the 2008 Report, which give statistics such as 'five of the main ethnic groups: Kikuyu, Kalenjin, Luyia, Kamba and Luo account for 70 percent of all civil service jobs. Of all the workers, 22.3 percent are Kikuyu, 16.7 per cent are Kalenjin, followed by Luyia (11.3 percent), Kamba (9.7percent), Luo (9.0percent) and Gusii (6.8 percent),' are newsworthy, but has the media asked the Commission to explain its methodology: how the Commission conceptualizes ethnicity and account for all probable errors of omission and inclusion? How has the media reported these statistics?

Recommendation

Kenya's current electoral system is incongruent with its the Constitution of Kenya 2010's aim of producing a socially plural society; Kenyan need think about an electoral system that can guarantee diverse representation without falling into an ethnic trap of reifying the present social identities and cleavages.

Kenyan need to debate and then ask Parliament to urgently enact the law that operationalizes the Article 232 (3) of the Constitution of Kenya 2010 in order to effect the values and principles of fairness in public service appointments envisaged by the drafter of the constitution. Both public and private sector should be bound by the same morality.

The NCIC should rethink its ethnic reports on the composition of governments. It should clearly state how it assess the degrees of ethnic dominance in public offices, not just provide statics without explanations on it operationalises and quantifies the legal definition of ethnicity or race. The report seems to encourage ethnic identification and provides a perverse incentive for ethnic extremist. It seems to organize the Kenya society against itself, not against the pillage by political elites.

The Kenya media needs to be critical of the NCIC reports, avoid sensational reportage, and ask tough methodological questions.

List of Policy Brief

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